ESTATE OF VICTORIA S. BEAR

IBIA 80-8 Decided July 15, 1980

Appeal from order by Administrative Law Judge Keith L. Burrowes approving will and ordering distribution.

Affirmed.

1. Indian Probate: Wills: Testamentary Capacity: Witnesses' Testimony

Where testimony by the attesting witnesses established that decedent, although illiterate, arranged for the making of her own will, knew the nature and extent of her property, and discussed her testamentary plan in detail with the witnesses while dictating the will, the fact that her will deviated from the statutory plan for intestate succession and thereby disinherited one of her nephews did not tend to show either lack of capacity by the testatrix or the exercise of undue influence by another person.

APPEARANCES: Dwight R. Bowen, Esq., for appellants Andrew Punkin, Jr., and Calvin Appenay; M. Jay Meyers, Esq., and Boyd B. White, Esq., for appellees Ivy A. Waterhouse and Alfred Nagitsy.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 2, 1977, Victoria Seaman Bear, the beneficial owner of interests in trust property administered by the Department, died at Blackfoot, Idaho, at the age of 84. She was survived by a brother and the children and grandchildren of deceased brothers and sisters. Her will dated April 27, 1972, was approved by an order dated January 18, 1979, which was affirmed by a subsequent order dated August 3, 1979, following a rehearing on petition by appellants and others. Appellant Andrew Punkin, Jr., who would have shared in an intestate estate had decedent died without a will, receives nothing under the approved will. Appellant Calvin Appenay receives a lesser share in the estate left by decedent than he would had there been no will. Appellee

Ivy A. Waterhouse would have shared in decedent's estate in the event of intestacy. She receives all of decedent's allotment No. 835, a 180-acre tract wholly owned by decedent, together with interests in other tracts which were partially owned by decedent. (Appellee's share is larger under the will than would have been the case had the estate been distributed under the statutory intestate distribution scheme.) Appellee Alfred Nagitsy, who would not have shared in an intestate estate, receives decedent's interest in allotment No. 836. The shares of other relatives are also affected by the distribution plan of the will. The shares of some of those who receive devises of trust property are increased or, in some cases, reduced. Some heirs who would otherwise have inherited from an intestate estate are omitted. Other persons who would have received nothing in the absence of a will are beneficiaries under the will.

Decedent's will was initially approved after a hearing held on August 8, 1978. Thereafter, appellants sought and obtained a rehearing to contest the will. The rehearing held on May 10, 1979, resulted in an order on August 3, 1979, which again approved the will and ordered distribution according to the will.

On appeal it is contended the decedent's will was improperly obtained by appellee Waterhouse who exerted undue influence upon decedent under circumstances which made her susceptible to overreaching because of age, infirmity, and general lack of education. Appellants also argue appellee's conduct, which allegedly succeeded in substituting her will for that of decedent, is evidenced by the testamentary plan of four related Indian will probates. According to this theory, appellee cultivated elderly relatives as part of a scheme which would create a dependency upon appellee which would then permit her to manipulate the elderly person to make a favorable will. The four wills purportedly expose a common pattern of unnatural gifts to appellee inconsistent with the natural preferences of the persons making the wills. Finally, it is contended the will should be set aside because it is unnatural.

At the hearing on the contest of will on May 10, 1979, both attesting witnesses to decedent's will testified. The first witness, a Bureau of Indian Affairs' clerk employed at Fort Hall, Idaho, testified that decedent came to the agency some days bef ore the will was executed to make an appointment to make a will. Decedent sought out the clerk, whom she knew through prior dealings with the agency, partly because they were acquainted, but also apparently because she sought a translator and knew the clerk to be fluent in the Shoshone language. Decedent also sought out the other witness to the will, who was a longtime acquaintance, and generally arranged for the will preparation and execution.

On the day the will was executed, decedent, the two witnesses (both of whom spoke Shoshone and English) and a typist met to make

decedent's will. The four women were alone while the will was prepared. Decedent dictated the terms to the clerk in Shoshone, simultaneously explaining her reasons for the plan of distribution she described, although her explanation was not included in the written will. Since the will was written in English, the process was a lengthy one, for it was necessary to translate back and forth from Shoshone to English and then to Shoshone again, in order to insure accuracy. When the will was prepared to decedent's satisfaction, she and the witnesses signed it. Both witnesses agree decedent was alert, knew what property she had, and which of her relatives and friends she wanted to make beneficiaries of her will.

The testimony of the will contestants does not conflict with that given by the attesting witnesses. Instead, Appellant Punkin concedes that decedent was "well" in 1972 when the will was made, but submits that she could not speak English (and, therefore, inferentially could not have made an English language will). Appellant Punkin also testified that he felt the will was obtained by undue influence because it was unnatural for decedent to exclude him, her nephew. Appellant Appenay's main contention, which he advanced during his testimony and has not abandoned on appeal, principally concerns a pattern of perceived manipulation appearing in four estates: those of decedent, Wishop Appenay, Esther Appenay Quagigant, and Jane Seaman Appenay. The three probate records were offered and were examined by the parties and the Judge. Appellant Appenay also testified that decedent was forgetful and was sick before she died.

Appellants agreed they seldom saw decedent in the company of her niece, Appellee Waterhouse, although decedent had lived with appellee for 16 years, in separate quarters next to appellee's house. Decedent maintained her own household. She did not drive a car, but depended upon Appellee Waterhouse for transportation. The two women were close friends.

[1] The testimony by appellants was directed to show that a pattern of undue influences would be seen working to the advantage of Appellee Waterhouse from an examination of the circumstances surrounding decedent generally. Their position is not supported by the record. It is undisputed that, as found by the Administrative Law Judge, while appellee shared in three of four related estates referred to by appellants, she was neither the only beneficiary of the will in those three cases, nor was she the principal beneficiary in those cases where she did inherit. There is no discernible pattern of unusual or unnatural gifts to appellee as suggested by appellants.

Similarly, appellants' arguments that decedent lacked understanding, suffered from feeble health, and executed a will in a language foreign to her while laboring under mistake or improper influence, also fail to find factual support in the record. There is no testimony decedent was infirm when she made her will in 1972. All the

testimony, including that of the appellants, indicates she was capable in 1972. She was dependent to a degree upon her niece for housing, transportation, and companionship, yet nothing in the testimony indicates this relationship was not mutually satisfactory to both women.

All the witnesses agree that decedent was unable to read English. This fact of itself proves nothing concerning the validity of the will she executed, although it explains the necessity for the interpreter-translator whom she enlisted to help her prepare the document. Estate of George Tsalote, 7 IBIA 261 (1979). The limitations imposed upon an Indian testatrix are defined by the Court's opinion in Tooahnippah v. Hickel, 397 U.S. 598 (1970). Numerous decisions by this Board have applied that holding, which allows great latitude to the testatrix here in her choice of devisees, and requires merely that she execute her will in conformity to Departmental regulations.

On appeal, appellants emphasize their argument that the will should be held invalid because it is unnatural. Since the decision in Tooahnippah v. Hickel, supra, it has been clear that this theory is no longer a viable legal ground upon which to base an order invalidating an Indian will. Estate of Leona Hale, 8 IBIA 8, 87 I.D. 64 (1980).

Based upon the evidence of record, the Administrative Law Judge correctly found decedent to be a competent testatrix and, further, he properly found that no undue imposition by anyone else influenced decedent to make the will admitted to probate in this estate. The will was properly approved pursuant to 25 U.S.C. § 373 (1976), as implemented by 43 CFR 4.233.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the order approving the will and determining heirs issued August 3, 1979, is affirmed.

This decision is final for the Department.

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Franklin Arness
Administrative Judge

We concur:

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Wm. Philip Horton
Chief Administrative Judge

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Mitchell J. Sabagh
Administrative Judge